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Top Notch Plumbing, Inc. and James Daniel Kelley.
Case 7-CA-44446

May 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN, AND ACOSTA

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to file an answer to the consolidated amended complaint and compliance specification. Upon a charge filed by James Daniel Kelley (the Charging Party) on October 12, 2001, the General Counsel issued a consolidated amended complaint and compliance specification on February 21, 2002, against Top Notch Plumbing, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the Act and setting forth the amount of backpay due. The Respondent failed to file an answer.

On May 1, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On May 7, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification shall be deemed admitted if an answer is not filed within 21 days from service of a compliance specification.

The consolidated amended complaint and compliance specification stated that the Respondent had 14 days to file an answer instead of the 21 days required by Section 102.56(a). However, on March 15, 2002, the Regional Director issued an Erratum granting the Respondent an additional 14 days to file an answer. Thereafter, by letter

¹ The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

dated April 4, 2002, the Region further notified the Respondent that unless an answer was received by April 12, 2002, a motion for default judgment would be filed.² Nevertheless, the Respondent did not file an answer to the consolidated amended complaint and compliance specification.³

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Martin, Michigan (the Martin facility), has been engaged in the removal, repair and installation of plumbing and heating systems. The Respondent's Grand Rapids Community College (GRCC) jobsite is its only location involved in this proceeding. During the calendar year ending December 31, 2000, the Respondent, in conducting its operations described above, purchased and received at its Martin facility and GRCC, Grand Rapids, Michigan jobsite, goods and materials valued in excess of \$50,000 directly from points located outside of the State of Michigan.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that West Michigan Plumbers, Fitters and Service Trades Association, Local No. 174, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union), is a

² The copies of the consolidated amended complaint and compliance specification, Erratum, and April 4, 2002 letter that were sent to Respondent by certified mail were returned marked "unclaimed." However, the Respondent's failure or refusal to accept certified mail or to provide for appropriate service cannot serve to defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn.6 (1986).

³ The General Counsel's motion and supporting exhibits, which are uncontroverted, indicate that the Respondent also did not file an answer to the original complaint in this case, which issued December 21, 2001.

⁴ The General Counsel's motion states that, on February 11, 2002, the Respondent notified the Region by telephone that it had ceased operations, had filed for bankruptcy, and that it would not be filing an answer in this matter. It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See *id.* *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Ahemis Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, William Brooks has held the position of president and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

On or about July 27, 2001, the Respondent, by its agent William Brooks, discharged the Charging Party at the GRCC jobsite because of his lack of membership in the Union.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has discriminated in regard to hire and tenure or terms or conditions of employment of its employees, thereby encouraging membership in the Union in violation of Section 8(a)(3) and (1) of the Act. The Respondent's unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by discharging James Daniel Kelley, we shall order the Respondent, in the event it resumes the same or similar business operations,⁵ to offer him full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed. In addition, we shall order the Respondent to make Kelley whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the compliance specification, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus any tax withholdings required by Federal and State laws. The Respondent shall also be required to expunge from its files any and all references to the unlawful discharge, and to notify Kelley in writing that this has been done. Finally, inasmuch as the Respondent ceased operations on September 21, 2001, we shall order it to mail, rather than post, copies of the attached notice to employees.

⁵ The compliance specification states that the Respondent permanently ceased operations on September 21, 2001, and that the backpay period ends on that date.

ORDER

The National Labor Relations Board orders that the Respondent, Top Notch Plumbing, Inc., Martin and Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employees because of their lack of membership in the Union or any other labor organization, except as permitted by Section 8(a)(3) of the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In the event the Respondent resumes the same or similar business operations, within 14 days thereafter, offer James Daniel Kelley full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make James Daniel Kelley whole by paying him \$9,365.76, plus interest and minus tax withholdings required by Federal and State laws, as set forth in the remedy section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discharge of James Daniel Kelley, and within 3 days thereafter, notify him in writing that this has been done, and that the unlawful conduct will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records, if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, a copy of the attached notice marked "Appendix"⁶ to all employees

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

who have been employed by the Respondent at any time since July 27, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 30, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

R. Alexander Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

MAILED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because of their lack of membership in West Michigan Plumbers, Fitters and Service Trades Association, Local No. 174, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, or any other labor organization, except as permitted by Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, in the event we resume the same or similar business operations, within 14 days thereafter, offer James Daniel Kelley full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James Daniel Kelley whole for any loss of earnings and benefits suffered as a result of his unlawful discharge prior to our ceasing operations by paying him \$9,365.76, plus interest, minus tax withholdings required by Federal and State laws.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful discharge of James Daniel Kelley, and WE WILL within 3 days thereafter, notify him in writing that this has been done, and that the unlawful conduct will not be used against him in any way.

TOP NOTCH PLUMBING, INC.